

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD DOUGLAS ORTIZ (deceased))	
Claimant)	
VS.)	
)	
VIC JOHNSON d/b/a JOHNSON TRUCKING)	Docket No. 1,006,697
Respondent)	
AND)	
)	
KANSAS WORKERS' COMPENSATION FUND)	
)	

ORDER

Respondent and the Kansas Workers' Compensation Fund (Fund) appealed the October 6, 2003 Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on March 9, 2004.

APPEARANCES

Michael L. Entz of Topeka, Kansas, appeared for Kathryn K. Ortiz, the surviving spouse of the decedent. John J. Bryan of Topeka, Kansas, appeared for respondent. Jeff K. Cooper of Topeka, Kansas, appeared for the Fund.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. Also, during oral argument to the Board, respondent acknowledged that the decedent's tax return was not a part of the record.¹

¹ Johnson Depo. Ex. 33; See also Respondent's/Appellant's Brief at 19.

ISSUES

1. Whether decedent was respondent's employee.
2. Whether respondent is subject to the Workers Compensation Act.
3. The decedent's average weekly wage.
4. Whether claimant should be estopped from alleging decedent was an employee of respondent.
5. Whether the Fund is liable for payment of the Award.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties briefs and argument, the Board finds and concludes that the ALJ's Award should be affirmed.

The decedent was an over-the-road truck driver. He was killed on September 1, 2002, when the semi-tracker trailer unit he was driving was involved in an accident. The truck he was operating was owned by respondent. It was being operated by the decedent under the terms of a written agreement between the respondent and the decedent. The agreement described the decedent as an independent contractor. However, that agreement establishes a right of control by respondent over the decedent that has consistently been held to constitute a relationship of employer and employee.² Based upon the precedent established by those Kansas appellate decisions, the Board finds decedent was an employee of respondent. Furthermore, the work decedent was performing was an integral part of respondent's main business.³

Respondent's payroll was sufficient to bring it within the Kansas Workers Compensation Act. Based upon the finding that decedent was an employee of respondent and the fact that respondent had a similar contractual relationship with other drivers, it is clear that respondent had a total gross annual payroll for the 2001 calendar of \$20,000 or more and reasonably expected a gross annual payroll in excess of \$20,000 for the calendar year 2002.

Decedent's average weekly wage was sufficient to allow for the maximum weekly compensation rate.

² See, e.g. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976); *Knoble v. National Carriers Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973); *Darnell v. Ronald Herpich Trucking*, Case No. 81,534, 983 P.2d 287 (Kan. App. July 23, 1999).

³ 3 *Larson's Workers' Compensation Law* § 62.01, p.62-2 (2000).

Claimant is not estopped from alleging that decedent should be treated as an employee of respondent for purposes of the Workers Compensation Act. As the ALJ pointed out in the Award, this case is factually quite different from Marley.⁴

Respondent represented that it would be unable to pay in the event an award was entered against it. This is supported by respondent's income tax return.⁵ There was no contrary evidence presented. Accordingly, the Fund shall be responsible for the payment of claimant's benefits.

In its brief to the Board, respondent requests "[e]quitable reformation of the contract."⁶ The Board declines to do so. First, this issue is raised by respondent for the first time on appeal. It was not presented to the ALJ. Although the ALJ raised this as a possible recourse in his Award, the ALJ specifically noted that neither party had sought this relief.⁷ Moreover, the Board perceives reformation to be neither equitable nor warranted under the circumstances in this case. One party to the contract is deceased and therefore has had no opportunity to present his position concerning what the parties intended by their written agreement.

Claimant attempted to offer an exhibit after his terminal date by attaching it to his submission letter to the ALJ. The exhibit was not offered within claimant's terminal date, nor at a hearing or deposition. Respondent's objection to claimant's Exhibit 36 is sustained. Judge Benedict did not consider this document and neither did the Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated October 6, 2003, is affirmed.⁸

⁴ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, rev. denied 269 Kan. 933 (2000).

⁵ R.H. Trans., Cl. Ex. 15.

⁶ Respondent's/Appellant's Brief at 2, 22 and 23.

⁷ Award at 3.

⁸ The ALJ's Award provides "A surviving spouse shall submit an annual statement to the employer and to the Director of the Kansas Division of Workers Compensation," Actually, K.S.A. 44-510b(i) provides that the annual statement is to be submitted ". . . to the insurance carrier, self-insured employer or group-funded workers compensation pool paying the benefits. . . ." In this case, the entity paying the benefits is the Kansas Workers Compensation Fund which is administered by the Kansas Insurance Commissioner.

IT IS SO ORDERED.

Dated this _____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Entz, Attorney for Claimant
John J. Bryan, Attorney for Respondent
Jeff K. Cooper, Attorney for Kansas Workers' Compensation Fund
Bryce D. Benedict, Administrative Law Judge
Paula Greathouse, Workers Compensation Director